has been much criticised, both because it overthrew a well-settled rule of construction, and disregarded the intention of the framers of the Constitution,[19] and because since an apportioned income tax was impracticable, it prevented the government from availing itself of this valuable source of necessary income.[20]

The difficulty thus created was finally met by the adoption of the Sixteenth Amendment, which was immediately followed by the Tariff Act of 1913,[21] providing for a graduated tax on all incomes over $4000, with certain exemptions, and imposing on all corporations a duty to retain and pay over the tax due on the interest from corporate bonds and mortgages. The plaintiff in the *Brushaber* case attacked the constitutionality of the tax, on the ground that, as it did not comply with the provisions of the Amendment, since the words "income from whatever source derived" forbade exemptions, it was a direct tax which must be apportioned under the rule of *Pollock* v. *Farmers' Loan & Trust Co.*[22] The court decided, however, that the tax was within the scope of the Amendment, the words in question having been introduced merely to do away with the distinction between income from property and professional earnings made in the *Pollock* case. It was also claimed that the tax, if indirect, violated the uniformity rule, and that the progressive tax based on wealth, and the duty imposed on corporations, were in conflict with the due process clause of the Fifth Amendment. It is well settled, however, that the due process clause is not a limitation on the taxing power of Congress,[23] unless the classification is so arbitrary as to amount to a real confiscation of property. Moreover, it is clear that only geographical uniformity is necessary to satisfy the requirements of Article I, Section 8.[24] Thus, the unanimous opinion of the court in upholding the constitutionality of the tax is unquestionable, whether the Amendment is regarded as authorizing an exception to the rule of apportionment, or as definitely classifying the income tax as indirect.

IS LEGAL OR MORAL WRONG INVOLVED IN THE "KNOWLEDGE OF RIGHT AND WRONG" TEST OF INSANITY? — In an opinion of marked force and ability, the New York Court of Appeals, speaking through Judge

---

[19] See 9 HARV. L. REV. 198; 20 HARV. L. REV. 280; 24 HARV. L. REV. 31.

[20] The practical effect of the decision seems to have been much less than might have been expected. Four years later, the Supreme Court, in Knowlton *v.* Moore, 178 U. S. 41, sustained an unapportioned succession tax on land. And, in 1911, in Flint *v.* Stone, Tracy Co., 220 U. S. 107, a tax upon the business of corporations, measured by the entire net income, was unanimously upheld. In both these decisions, the court distinguished the Pollock case on the ground that the tax there discussed was imposed on property because of its ownership, while in these cases it was a tax on the right to use property in a certain way. But the distinction seems more formal than substantial. See 24 HARV. L. REV. 563.

[21] Sec. II, ch. 16, 38 U. S. STAT. AT L. 166.

[22] 158 U. S. 601, 635.

[23] Patton *v.* Brady, 184 U. S. 608; McCray *v.* United States, 195 U. S. 27, 61; Billings *v.* United States, 232 U. S. 261, 282.

[24] Head Money Cases, 112 U. S. 580, 594; Knowlton *v.* Moore, 178 U. S. 41, 83; Patton *v.* Brady, 184 U. S. 608, 622; Flint *v.* Stone, Tracy Co., 220 U. S. 107, 158; Billings *v.* United States, 232 U. S. 261, 282.

Cardozo, has given a broad construction to the narrow statutory test of insanity in force in that state. In the case under discussion, the trial court had excluded the defense that the accused, though he knew he was committing the legal crime of murder, insanely believed that he acted under the direct command of God. Conviction was affirmed because the record contained an admission that the defendant was sane, but the ruling of the trial court was disapproved in an elaborate *dictum*, which will doubtless have the effect of establishing the New York rule. *People* v. *Schmidt*, 216 N. Y. 324.

The New York Penal Law [1] adopts the language of *McNaghten's Case*,[2] which gives a defense to insane persons only when they did not know the nature or quality of the act they were doing, or did not know "that the act was wrong." It seems that the judges in *McNaghten's Case*, who only stated the law as they found it, understood "wrong" as meaning only legal wrong.[3] Judge Cardozo, however, considers the word to have the broader signification of moral, as well as legal wrong. Some reliance is placed on English cases where the jury were charged in general terms that the accused must have known the act to be "contrary to the laws of God and man," or must have understood the "wickedness" of his act, and other similar phrases. But in the ordinary case it is really not necessary to distinguish legal from moral wrong, and courts may incline to use such general expressions rather than burden the jury with unnecessary technical refinements. On the other hand, if the few reported American cases that are either decisive or explicit reflect the meaning of the rest, the ambiguous language of the state courts of to-day refers to "wrong" in its broader interpretation.[4] The penal codes of the various states [5] are as silent on the question as that of New York, but of the foreign codes that have adopted substantially the same test six expressly use the words "criminality" or "illegality," whereas only two define "wrong" in its moral sense.[6]

---

[1] § 1120.

[2] 10 Cl. & F. 200.

[3] In the debate in the House of Lords prior to asking the opinions of the judges on the McNaghten Case, Lord Brougham said "he knew the learned judges used the phrase with reference to the commands of the law." 67 HANSARD'S DEBATES, Third Series, 732. See also the opinions in accord in OPPENHEIMER, CRIMINAL RESPONSIBILITY OF LUNATICS, 34 *ff.*, 142, and 148 *ff.*, and in STROUD, MENS REA, 73–77. See WOOD RENTON, LAW OF AND PRACTICE IN LUNACY, 902, for the other view. The doubt on the subject is due largely to ambiguous phrases used in charges to juries. See Bellingham's Case, I. COLLINSON, LUNACY, 636, 673; Regina *v.* Townley, 3 F. & F. 839; Regina *v.* Layton, 4 Cox C. C. 149. But compare the explicit language of Bramwell's charge in Regina *v.* Dove, cited in WOOD RENTON, LAW OF AND PRACTICE IN LUNACY, 901: "You must be satisfied that he had not a sufficient degree of reason to know he was doing an act which was wrong. Of course, that means doing an act prohibited by law. . . ." It is interesting to know how Sir J. F. Stephens would have charged the jury on the facts of the principal case. In his HISTORY OF THE CRIMINAL LAW, II, p. 160, in a note he says: "My own opinion however is that if a special divine order were given to a man to commit murder I should certainly hang him for it unless I got a special divine order not to hang him."

[4] Kearney *v.* State, 68 Miss. 233, 241, 8 So. 292, 294, seems to be the only direct decision, but in the charge in Guiteau's Case, 10 Fed. 161, 182, the court said: "If a man sincerely believes he has a command from the Almighty to kill, it is difficult to understand how a man *can* know it is wrong to do it." Usually the language of the courts is loose and indefinite. See State *v.* Jackson, 87 S. C. 407, 415, 69 S. E. 883, 886.

[5] Collected in 3 JOURNAL OF CRIMINAL LAW, 890, and 4 *Id.*, 67.

[6] Collected in OPPENHEIMER, CRIMINAL RESPONSIBILITY OF LUNATICS, c. 3.

In theory, legal wrong would seem the proper interpretation. If the law is to be an efficient preventive of crime, all who could be deterred should be threatened with its sanctions.[7] Only with the irresponsible, against whom the threat of the law is vain, must the law have recourse to the hope of a cure by the psychopaths. Irresponsibility results from an absence of choice, that is, where mental disease or infirmity either inhibits the ability to choose or affects the understanding of the alternatives. It is true, the *McNaghten* test has been criticised as looking only to the understanding and ignoring the volition element, and some courts have consequently recognized irresistible impulse as a defense negativing a voluntary choice.[8] But that possibility is admittedly excluded in New York by the code provision.[9] If, then, the supposed command of God, in the principal case, was irresistible, there would be no defense under the code on that ground. If resistible, then it is a case of one who voluntarily broke the law of the land for moral reasons, and in this respect the insane man is in no better position than the Mormon who feels impelled by divine command to commit bigamy.[10] For the law is not concerned with insanity as such, but only as it bears on the responsibility of the actor. In each case the defendant has made his choice, with a capacity to understand and obey the law, and he should be visited with its penalties.

It is entirely natural that the court should chafe at the narrowness of the statutory test, and seek to give it the broadest interpretation. Our attitude toward the insane defendant has undergone a change. A hundred years ago courts were presented with the alternatives of hanging the defendant or of casting him into a madhouse; there was little room for mercy in the choice. But to-day the defendant can be sent to a hospital in hope of a cure; and the danger is that mercy will exaggerate the hope. However, the construction adopted would cover only a small and anomalous class of cases of questionable expediency, and would leave unremoved the essential objection to the *McNaghten* test. The proper direction for reshaping the law on this subject is the adoption, not of any legal test however broad, but of the recommendations of the American Institute of Criminal Law and Criminology.[11] Let the psychopathic experts, chosen by the impartial court, examine the defendant as a patient and tell the jury how his alleged mental disease had impaired his understanding and volition in respect to the act charged; let the court charge the jury as to what understanding and volition are necessary to the crime; then let the jury measure the facts by the legal requirements. Such a division of labor would abate somewhat the long-standing conflict between the legal and medical professions, recognizing, as it does, the distinctness of the legal and medical problems involved.

---

[7] See Lord Bramwell, "Insanity and Crime," 18 NINETEENTH CENTURY, 893.

[8] Plake *v.* State, 121 Ind. 433, 23 N. E. 273. For further citations, see 3 WITTHAUS & BECKER, MEDICAL JURISPRUDENCE, 2 ed., 450 and 455.

[9] See Flanagan *v.* People, 52 N. Y. 467; People *v.* Wood, 126 N. Y. 249, 268, 27 N. E. 362, 367.

[10] Reynolds *v.* United States, 98 U. S. 145.

[11] See REPORT OF COMMITTEE B, 1911, 2 JOURNAL OF CRIMINAL LAW, 521, 525. Alabama (Parsons *v.* State, 81 Ala. 577, 2 So. 854) and New Hampshire (see Doe, J., in State *v.* Pike, 49 N. H. 399, 408) have progressed so far as to abolish the legal tests for insanity, but they both lack the important feature of an impartial selection of the experts by the court.